No. 11024

In the United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

A. G. E. ABENDROTH, DOING BUSINESS AS CANDY & TOBACCO HOUSE, APPELLEE

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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STATEMENT

Appellee, A. G. E. Abendroth, doing business under the assumed name of Candy & Tobacco House, operates a small wholesale grocery business in Portland, Oregon. Amongst the items he sells are candy and tobacco. On August 4, 1944, an action was brought against him by the Price Administrator for

the sum of $14,919.87 as treble damages for sales of groceries at allegedly above ceiling prices (Case No. 2532, U. S. District Court for the District of Oregon). On the 9th day of September, 1944, the Administrator brought the within suit for inspection of the same records that the Administrator examined and/or had in his possession prior to the filing of the treble damage action. Trial was had of Case No. 2532 in November, 1944, resulting in a final judgment for the defendant insofar as any damages for the alleged above ceiling sales were concerned. On December 5, 1944, an order was entered dismissing the suit seeking inspection of the above mentioned appellee's records.

SPECIFICATION NO. 1

This appeal should be dismissed because it is based upon a moot question.

ARGUMENT

The purpose of inspecting the records was to obtain the basis for the bringing of a damage action by the Administrator for alleged sale of candy and tobacco at above ceiling prices. Counsel for appellant so informed the court (Tr. 25-26):

> "Miss Gallagher: It is perfectly clear these are two separate and distinct cases, your Honor?

The Court: One of them is a proceeding for discovery and the other is a trial of a damage issue.

Miss Gallagher: Yes, but the discovery is aimed toward a different particular and a different set of circumstances than the case which is already filed.

The Court: Oh, it is?

Miss Gallagher: Yes, your Honor.

The Court: Oh, I see. *So if you get the information you want you will bring another case against him?*

Miss Gallagher: That is right."

For that purpose appellant seeks an examination of the purchase and sales records from November 1, 1943 to and including August 22, 1944. (See complaint Tr. 2).

The Emergency Price Control Act itself limits the right of the administrator to bring an action for violation of the Act to one year from the date of the alleged violation. 50 U.S.C.A. Sec. 925(e), p. 405:

> "If any person selling a commodity violates a regulation, order or price schedule . . . the person who buys such commodity . . . may, *within one year* from the date of the occurrence of the violation . . . bring an action against the seller on account of the overcharge."

Quoting from the same section on p. 406:

> "If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for

any reason to bring the action, *the Administrator* may institute such action on behalf of the United States *within such one year period.*" (Italics ours.)

Since the last record sought in the suit would be August 22, 1944, no action could be properly brought by the Administrator even if he found violations from those records. The appeal should, therefore, be dismissed.

SPECIFICATION NO. 2

The Act does not provide for it and appellant has failed to lay the proper foundation for the relief prayed for.

ARGUMENT

He bases his complaint upon Sec. 922 of the Emergency Price Control Act appearing in Title 50 U.S.C.A. p. 360. Subsection (e) does grant the District Court jurisdiction to require a person who fails to obey a subpoena to appear and produce documents. There is nothing said about further jurisdiction of the court excepting that that subsection "shall also apply to any person referred to in subsection (b)." That refers to the last sentence in subsection (b) which provides that the Administrator may administer oaths and subpoena persons to testify and produce documents.

Appellant's complaint and affidavits show on their face that no subpoena was ever issued by the Administrator. It is true that the Administrator is given the right to inspect records, but neither he nor the Court are given the right to force inspection of records excepting through the procedure of subpoena. This would appear from a close examination of the Act itself and also from the general principles of law, and some support is given to that interpretation in the case of *Brown v. Glick Bros. Lumber Co.*, 52 F. Supp. 913, D.C. Cal. 1943.

SPECIFICATION NO. 3

The Trial Court properly exercised its discretion and no abuse of that discretion is proved in appellant's brief.

ARGUMENT

While the Court is given jurisdiction to require the appearance of a person and the production of his documents, the Act does not make it mandatory upon the Court to do so. The matter is therefore within the discretion of the Court. In this case the Court tried the treble damage action brought by the Administrator for $14,919.87. In that trial the Court had opportunity to ascertain to what extent the records of appellee were examined by appellant. Moreover, the

affidavits submitted on behalf of appellant themselves disclose that appellant's representatives not only inspected practically all of the records in issue at appellee's place of business, but took them to the office of the Administrator and kept them for a considerable length of time (Tr. 5). Numerous sales records and purchase invoices totaling "approximately 6,000 transactions" (Tr. 7) were examined by the Administrator. Examination was commenced on January 20, 1944 and the last records were not returned until March 29, 1944. (Tr. 5 and 6)

In the trial proceedings of case No. 2532 on page 41, Mr. Singleton, a representative of appellant, testified as follows:

> "Q. Now, Mr. Singleton, you had some of Mr. Abendroth's records in your office with you, did you?
> A. Yes, I did.
> Q. How long a period of time did you work on his records?
> A. Oh, I would say about two months. It was quite a job.
> Q. And what proportion of that time did you put on that?
> A. Full time.
> Q. You worked on his records full time for two months?
> A. That is right.
> Q. And did you have any assistance?
> A. I did.
> Q. How much assistance did you have?
> A. One other man besides myself.
> Q. And he worked on it full time also?
> A. That is right."

The transcript of those trial proceedings is on file with the clerk. Mr. Singleton also testified as follows on page 43 of those trial proceedings:

> "Q. Now during that period you also asked him to permit you to take the records from his own place of business to your office?
> A. That is right.
> Q. And he permitted you to do so?
> A. That is correct.
> Q. And you took whole cartons full of records?
> A. I took cartons which I enumerated to you a while ago are the bound sales, invoices of his sales in bound book form, which are numbered and were placed in cartons approximately a yard long when we sat in there for a full month. We took a month at a time. . . ."

And on p. 45:

> "Q. I see. Well then each one of these cartons that we estimate might have had from two thousand to four thousand invoices?
> A. I would say around that figure probably."

Mr. Abendroth's affidavits (Tr. 9, 10, 11, 12 and 13) showed among other things (Tr. 10):

> "That said investigation caused an interruption of business at considerable expense to respondent and any further investigation would do likewise."

(Tr. 12)

> "That said investigators examined invoices covering current purchases and sales as well as numerous other items purchased and sold by affiant in his business. That I discussed the matter of specific candy sales with Cecilia P. Gallagher

prior to the time that the investigators examined records of affiant."

(Also on Tr. 12)

"that said investigators examined invoices covering candy purchases and sales as well as numerous other items purchased and sold by affiant in his business; . . ."

The Court, therefore, had before it testimony by way of affidavits to the effect that candy sales were both discussed and examined by appellant's representatives. The mere fact that a different method of computation of the ceiling price was used by appellant on different articles sold by appellee would not justify unreasonable and duplicating examinations or inspections by appellant. The affidavits of appellee show that his business is a small one and that the inspection by appellant caused subtsantial loss to him. It would be unreasonable to duplicate that loss unnecessarily.

It is true that the Court was satisfied as a result of the trial in Case No. 2532 that the Administrator would have no further cause against appellee, but that is not the only ground that is apparent for the dismissal of the suit. A reasonable opportunity for the inspection of the records is all that appellant should expect, and the Court found that that reasonable opportunity had already been afforded appellant. The Court exercised its discretion properly. In fact, it would have been an abuse of its discretion to subject

appellee to the unreasonable duplicating search that appellant sought.

For each of the three specifications mentioned, the lower court's order should be affirmed.

Respectfully submitted,

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Attorney for Appellee.